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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1000

CARMINE SANTIAGO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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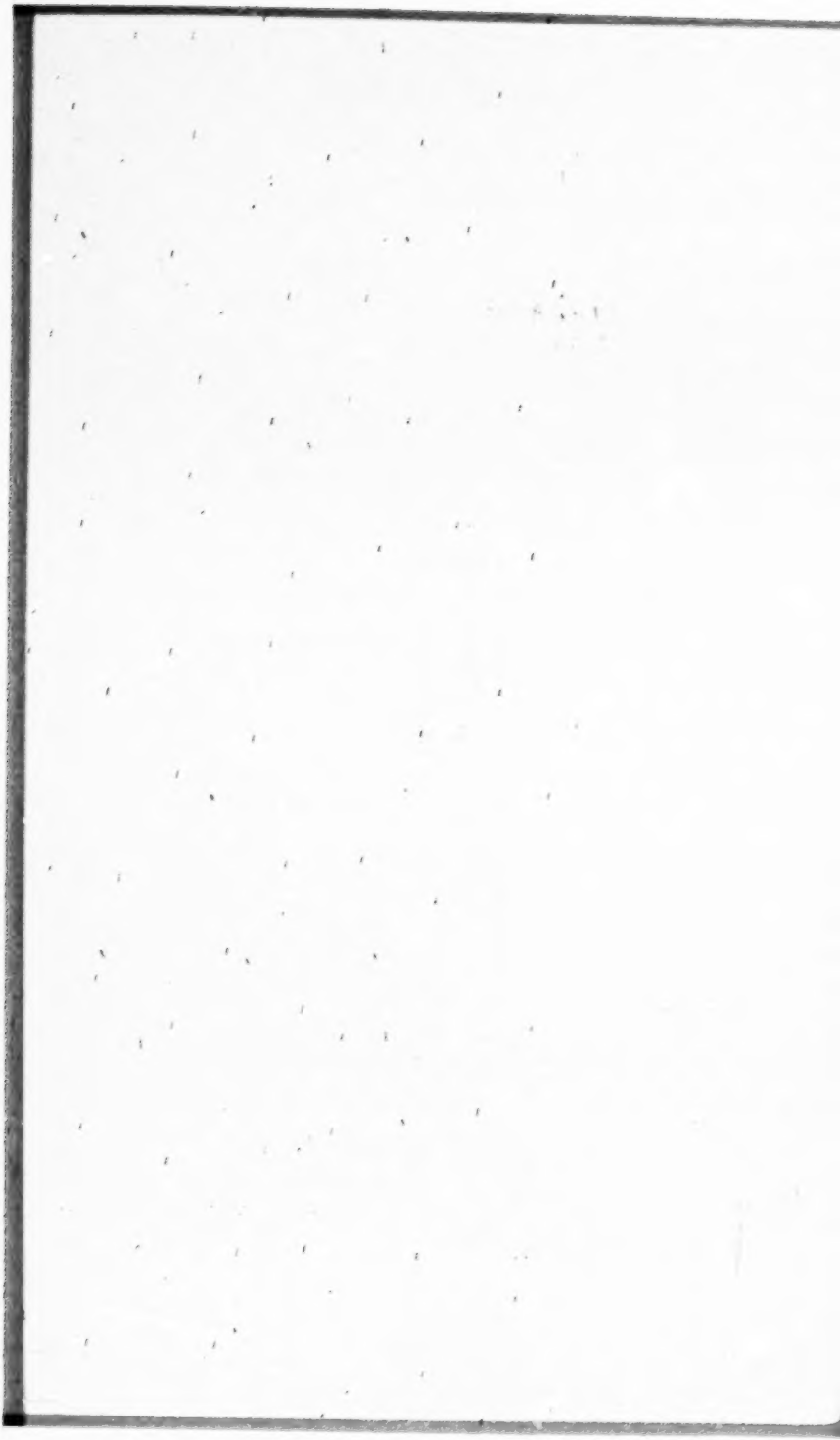

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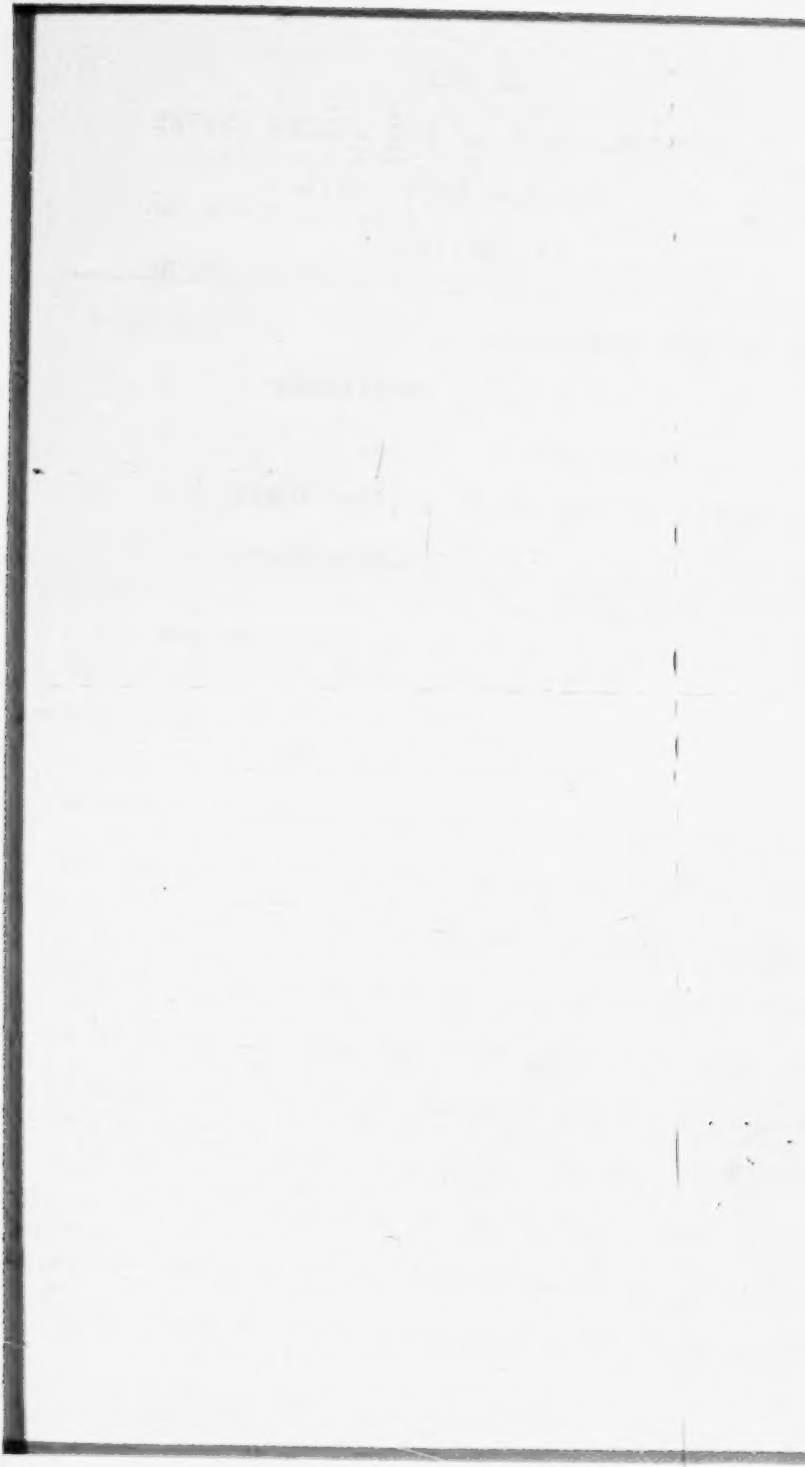
PRELIMINARY STATEMENT

The petitioner, Carmen Santiago, seeks a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, which, on June 24, 1974, affirmed without opinion a judgment of the Supreme Court of the State of New York, County of Kings, rendered July 15, 1971, convicting her of Criminal Possession of a Dangerous Drug in the Second Degree; Criminal Possession of a Dangerous Drug in the Fourth



Degree and Possession of a Weapon as a Misdemeanor. She was sentenced to a term of imprisonment of five to fifteen years on the Second Degree count, a maximum of seven years on the Fourth Degree count, and one year on the Weapon count, said sentences to run concurrently. Leave to appeal to the Court of Appeals of the State of New York was denied on November 15, 1974.

By Kings County Indictment No. 4236/1970, the petitioner was charged with Assault in the Second Degree, Criminal Possession of a Dangerous Drug in the Second and Fourth Degrees, and Criminal Possession of a Dangerous Weapon as a Misdemeanor. On April 19th and 20th, 1971, a hearing both to controvert a search warrant and to suppress evidence was held. The motion to controvert was denied, while the motion to suppress was granted in part and denied in part. On May 5, 1971, a jury trial was held and the petitioner was found guilty of the above, except for the Assault charge. On July 15, 1971, the petitioner was sentenced as aforesaid.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) and Rule 19, subdivision 1 of the rules of this Court.

STATEMENT OF FACTS

At the hearing to controvert and suppress, PATROLMAN STEPHEN SPINELLI testified that during September, 1970, he was assigned to the Narcotics Division to investigate illegal narcotics activity. On September 17, 1970, at approximately 8:30 p.m., the witness submitted a search warrant and affidavit to Judge Murray of the Brooklyn Criminal Court, who signed the warrant (H4).* In connection with the affidavit for the warrant, the witness received confidential information from a registered police informant who had previously given the witness information concerning narcotics activities on thirty separate occasions. The witness then gave five specific instances where information given by

* Numbers in parentheses preceded by the letter "H" refer to pages of the minutes of the hearing.

the informant led to arrest, indictment, and conviction of five individuals for narcotic activities. These individuals were listed in the affidavit accompanying the instant search warrant (although the appellant does not include it, the respondent will provide the court, in the appendix, with the relevant portions of the affidavit under attack on appeal) (H5-8).

Concerning appellant, the registered informant informed the witness that he observed appellant selling narcotics and in possession of large quantities of narcotics both in the Hotel St. George, room 851, and on the street. As a result of this information, the witness went to the Hotel St. George and made eighteen observations of room 851 from July 17, 1970, to September 16, 1970, at all hours of the day and night. The affidavit listed four observations, September 11, 14, 15, and 16, 1970. During those September observations, the witness observed individuals standing around the door of 851. Thereupon appellant would open the door,

hand the individual a brown paper bag, and appellant, in turn, would receive money from the individual (H9-16). The witness was also involved in a prior arrest of appellant in October, 1969, involving illegal narcotic activities in the Hotel St. George.

The warrant was executed by the witness and three fellow officers in the Narcotics Division at approximately 10 p.m. on September 17, 1970. The hotel manager opened the door to room 851 and a search of the room ensued. In appellant's closet, in her bag, was found a quantity of heroin and all kinds of narcotic implements and cutting devices. Also found in a shoe box was nearly $5,000 in cash. Besides this contraband, the police also recovered items and articles of personal property all bearing appellant's name. The room, however, was registered to a "Peter Gomez" who was also named in the warrant, but there was no evidence of a male living in the room. Nor was this individual ever seen entering or leaving the room (H18-21).

After searching the room, the police waited for appellant's return. This came to pass at about 7:30 a.m. the following morning. At that time, the witness observed appellant from the hotel window park her car and enter the hotel. A few minutes later, the witness heard a key go into the door, the door opened; appellant had her hand in her pocketbook and as the witness and his partner attempted to grab her, the pocketbook fell to the floor and appellant had a .38 caliber gun in her hand. The officers grabbed the gun and it was found to be loaded (H31-35). The pocketbook was recovered and heroin and cocaine were found within (H39). (Heroin was also found in appellant's car but the court ultimately ordered these narcotics suppressed.)

Appellant was placed under arrest and was put into the witness' car. As the witness was driving to the precinct, he observed appellant through the rear view mirror adjusting her blouse and pants and "when she made a move

toward the window . . .", ostensibly to throw a cigarette out, "I hit the brake of my car and grabbed her hands, and I obtained a small package, a plastic envelope, containing alleged cocaine" (H41).

The return of the search warrant was made on September 30, 1970, before Judge Murray (H42).

Upon cross-examination, the witness stated that he first learned that appellant was involved in narcotics and was a wholesale supplier in Brooklyn in 1969 (H45-46). Concerning the observations, Patrolman Taylor, the witness' partner, was not allowed near room 851 as appellant knew him (H56). As to the informant, the witness could not recall the date of the conversation but it was months before the arrest (H58). The last time the witness saw the informant was during the summer of 1970 (H59).

The witness was then questioned about the names of the arrested individuals listed in the affidavit and it was noted that although these individuals were subsequently convicted for narcotic sales to undercover police officers, the

fact that they were convicted was not mentioned in the affidavit (H65-70-b).

The first time the informant told the witness about appellant's narcotics operation was in the early part of 1970. The informant was in the room with appellant maybe seven times and the informant is himself an addict (H79). Concerning paragraph 3 of the affidavit, the informant told the witness that he and others purchased drugs from appellant in room 851 of the Hotel St. George (H85). Again the witness could not recall the exact date of this conversation except that it occurred during the early part of 1970 (H87). After receiving this confidential information, the witness initiated a "questioning investigation, just checking around" (H88). However, actual observations of the subject room commenced during July, 1970 (H89).

The questioning turned to the witness' observation. On September 11, 1970, the witness observed seven addicts known to him from the 76th Precinct area, enter and leave room 851 (H91).

During this period, the witness observed appellant open the door (H96,99). On September 14, 15, and 16, 1970, five addicts were seen entering and leaving the room. However, the total individuals known to the witness was nine (H99,101-102). The witness also had information that others were working for appellant, "dealing" on the street (H103). Concerning the search of the room, when the room was searched, only female clothing was found (H156).

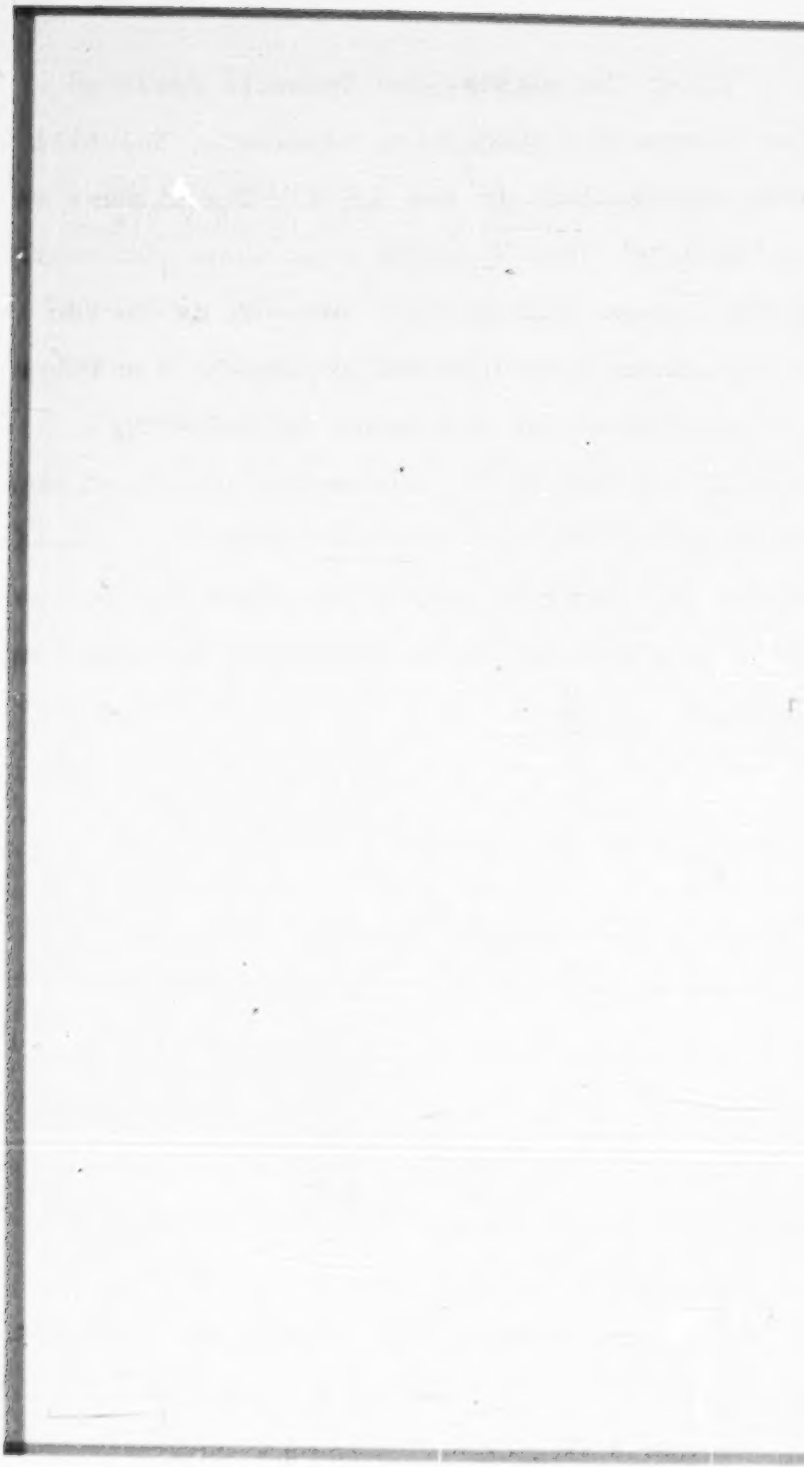
PATROLMAN THOMAS JACKSON was called as a defense witness and stated that since September, 1970, he was Spinelli's partner. When the questioning turned to the observations made by Spinelli on September 11, 1970, the witness stated that, "Patrolman Spinelli and I never stayed together really on the observations" (H172). The witness, however, was on the eighth floor but he had no independent recollection of anyone entering or leaving room 851 (H173). However, his notes indicated that he and Spinelli observed addicts leaving the room on various dates (H174,176,178). Further, during those

dates, the witness observed appellant in the lobby of the hotel in the morning (H179). Concerning the execution of the warrant, the seizing of the narcotics, the apprehension of appellant with her gun, and the recovery of the narcotics in her pocketbook, the officer's testimony was substantially that of Patrolman Spinelli.

PATROLMAN WILLIAM TAYLOR was called as a defense witness and stated that prior to September 17, 1970, he worked with Patrolman Spinelli on this case and was present in early 1970 when Spinelli had a conversation relating to narcotics with the informant concerning appellant (H209-210). Further, the witness knew appellant (H211). The questioning then turned to that portion of Spinelli's affidavit where the individuals arrested as a result of the informant's information were listed. It was brought out that these individuals were arrested and charged with crimes involving dangerous drugs. The arrests were effected by the witness and Spinelli (H211-228).

After the witness and Spinelli received the information concerning appellant, Spinelli made observations in the hotel. The witness was in the hotel when Spinelli made these observations (H230). More than likely, however, as to the observations listed in the affidavit, the witness was not present at the hotel (H237-238).

At the hearing's conclusion, the court made findings of fact and concluded that the reliability of the informant was shown and there was probable cause on the face of the affidavit for a warrant to issue.



ARGUMENT

POINT I

THE RELIABILITY OF THE INFORMANT AND THE ACCURACY OF HIS INFORMATION WERE CLEARLY STATED ON THE FACE OF THE AFFIDAVIT.

The law is well settled, and the petitioner does not contest, that an affidavit for a search warrant may be based on hearsay and need not reflect the personal observations of the affiant. When such a situation obtains, however, the affidavit must meet the two-prong test first laid down by this Court in Aguilar v. Texas, 378 U.S. 108, 114-15 (1964), and expounded upon in Spinelli v. United States, 393 U.S. 410 (1969), and United States v. Harris, 403 U.S. 573 (1971).

The test of Aguilar requires that the magistrate be able to conclude, from the face of the affidavit, both that the affiant's informant was credible and that his information was reliable. Respondents respectfully submit that the affidavit in question provided a more than ample basis for such a conclusion.

Taking the second prong first, the affidavit clearly stated that the informant observed the

petitioner in possession of narcotics and further observed the petitioner sell narcotics on various occasions. Such personal observation on the part of the informant obviously provides the greatest assurance that the information is in fact reliable, and has been previously considered by this Court to be sufficient. Spinelli v. United States, supra, 393 U.S. at 415; United States v. Harris, supra, 403 U.S. at 581. Petitioner's position on this point is apparently inconsistent: at first she asserts that the second prong of the Aguilar test was not met, but then appears to concede that the "nature of the information given by the informant was direct knowledge." Petitioner's Brief, pp. 13-14. Respondents submit that the second prong of the Aguilar test was clearly satisfied.

The first prong of the Aguilar test requires the affidavit to contain sufficient allegations to enable the magistrate to conclude that the informant was credible. The petitioner, in denying the propriety of the magistrate's conclusion, focuses upon the failure of the affidavit to allege that the arrests to which

the informant's prior information had led resulted in convictions. In so doing, the petitioner completely ignores the informant's clearly stated declarations against penal interest. Respondents submit that such declarations, even standing alone, were a sufficient indication of the informant's reliability, and that the other information - although unnecessary - simply provided additional indicia of reliability.

In the case at bar, the unnamed informant stated to the affiant that "he has purchased narcotics from [the petitioner] on numerous occassions [sic]." Such declarations against penal interest have been held by this Court to be sufficient, in and of themselves, to support a finding of the informant's credibility. United States v. Harris, supra, 403 U.S. at 583-84. In Harris, the informant had stated that he had purchased illicit whiskey from the defendant for a period of more than two years. Respondents submit that the present case is plainly controlled by United States v. Harris, supra, and that the

first prong of the Aguilar test has been thereby satisfied.

Even on its own terms, the petitioner's argument that the failure of the affidavit to allege that the informant's information led to convictions and not merely arrests made improper the finding that the informant was credible is without merit.

In considering such preliminary determinations as probable cause, this Court has emphasized that "we deal only with probabilities that 'are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" United States v. Harris, supra, 403 U.S. at 582-83, citing Brinegar v. United States, 338 U.S. 160, 175 (1949).

On such a basis, it seems clear that averments that prior information led only to arrests would be sufficient. First, a conviction may be precluded by factors unrelated to the validity of the informant's information. Second, such an averment would seem to provide a greater indication of reliability than would the mere

allegation that the informant had previously given correct or accurate information; yet such an allegation has been considered sufficient by this Court. See Jones v. United States, 362 U.S. 257, 268 n.2 (1960); Draper v. United States, 358 U.S. 307, 309 (1959). Finally, a police officer would not, as a practical matter, continually rely on the information from an informant which turned out to be false. Yet here the affiant relied on the informant's information at least six times. The lower federal courts which have considered the question have rejected the petitioner's argument. See United States v. Comissiong, 429 F. 2d 834, 835-36 (2d Cir. 1970); Albitez v. Beto, 465 F. 2d 954 (5th Cir. 1972).

In sum, the informant was shown to be credible and his information reliable.

POINT II

THE INSTANT WARRANT WAS NOT BASED ON STALE INFORMATION.

The petitioner argues that the warrant in the case at bar was based on stale information because the critical conversation between the affiant and the informant occurred about six months prior to the affiant's initial observations, and about nine months prior to the date the search warrant was issued. The petitioner further argues that the instant affidavit was insufficient on its face, because the date of that conversation was omitted therefrom. Respondents respectfully submit that, whatever the validity of these arguments considered in vacuo, they are without merit on the facts of this case, because of the clear evidence from which the magistrate could reasonably have concluded that the petitioner's illegal activities continued unabated until the time the search warrant was executed.

This Court first addressed the question of staleness over forty years ago, when it was held that the facts alleged in the affidavit must be

"so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932). This does not mean, however, that information which may be several months old is totally irrelevant. On the contrary, it will certainly be at least relevant so long as it tends to indicate a present probability of illegal activities when considered in conjunction with more recent information. This Court has so held. United States v. Harris, supra, 403 U.S. at 579 n.*.

It can hardly be disputed the search warrant could properly have issued had it been sought shortly after that conversation between the affiant and the informant. How much of a delay in making the application would have been permissible - that is, how long after that conversation a magistrate could properly have found present probable cause relying solely thereon - is debatable. Respondents submit that the distinction drawn by the lower federal courts between allegations which indicate a continuing offense and those which indicate merely an isolated incident,

insofar as permissible delay is concerned, is eminently reasonable, and plainly heeds the injunction of this Court to interpret affidavits for search warrants in a "commonsense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 108 (1965). Compare Bastida v. Henderson, 487 F. 2d 860, 864 (5th Cir. 1973); United States v. Johnson, 461 F. 2d 285, 287 (10th Cir. 1972); and United States v. Harris, 482 F. 2d 1115, 1119 (3d Cir. 1973), with United States v. Neal, 500 F. 2d 305, 309 (10th Cir. 1974); and Durham v. United States, 403 F. 2d 190, 194-95 (9th Cir. 1968), vacated on other grounds, 401 U.S. 481 (1971).

The information from the informant leads clearly to the conclusion of a continuing violation. But, the petitioner will argue, the date of that conversation was omitted from the affidavit, and a narcotics operation such as the one conducted by the petitioner could hardly be presumed to continue indefinitely.

With that, Respondents will agree. We will not argue to this Court that the petitioner's

narcotics operation could reasonably be thought to continue indefinitely, or even for six or nine months. We would respectfully concede that the warrant would have been invalid had it been based solely on a nine-month-old conversation. However, Respondents would submit that, on the facts of this case, the failure to include the date of that conversation in the affidavit was not fatal, and that the petitioner's narcotics operation was shown to have continued up until the date of the warrant's issuance, by virtue of the affiant's observations.

The question of whether a warrant is invalidated by the omission from the supporting affidavit of the date of the conversation between the affiant and the informant is one that has divided the lower federal courts. Some hold it invalidates the warrant. See Rosencranz v. United States, 356 F. 2d 310, 315-17 (1st Cir. 1966); United States v. Boyd, 422 F. 2d 791, 793 (6th Cir. 1970). Others hold that it does not. See Rider v. United States, 355 F. 2d 192, 193 (5th Cir. 1966); United States v. Unger, 469 F. 2d 1283, 1287-88 (7th Cir. 1972);

United States v. Conti, 361 F. 2d 153, 156 (2d Cir. 1966), vacated on other grounds, 390 U.S. 204 (1968). We submit that this question need not be reached in the case at bar because, regardless of the date of that conversation, the affiant's own observations indicated a present probability of illegal activity.

On various dates, the affiant observed persons known to him to be drug addicts enter the petitioner's premises and exit after a short time. These observations are entirely consistent with the notion that these persons went to the premises for the purpose of purchasing narcotics and, having completed their transactions, left immediately. Respondents respectfully submit that it was therefore proper for a magistrate, concerned only with a balancing of probabilities, to conclude that the petitioner's continuing illegal operation was still being conducted, and that there was - at that time - a reasonable basis for a search. Cf. United States v. Harris, supra, 403 U.S. at 579 n.*.

The petitioner's effort to impeach the affiant's statements in this regard is, at this

point, unavailing. The hearing court, who had the opportunity to observe the demeanor, and evaluate the credibility of the affiant, fully credited his statements. It would be inappropriate for this Court to now determine otherwise.

CONCLUSION

FOR THE AFOREMENTIONED REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
March, 1975

Respectfully submitted,

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